89-1250

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

IN THE MATTER OF THE EXTRADITION OF
ANTONIO MANZI

ANTONIO MANZI, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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31pp

QUESTIONS PRESENTED

I. Whether or not due process requires this Court to re-examine and modify the "Rule of Non-Inquiry" in extradition cases, and, in the case here presented whether discovery and an evidentiary hearing with respect to the danger to the Petitioner-Manzi's life posed by extradition to Italy should have been permitted.

II. Whether or not the Petitioner-Manzi was denied due process of law by the United State's Magistrate's failure to order the United States to produce properly translated copies of the Italian statutes providing credit for time served for persons incarcerated abroad in connection with extradition proceedings.

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The opinion of the United States Court of Appeals for the First Circuit, (App. 1-18), is reported at 888 F.2d 204 (1st Cir. 1989). The opinion of the United States District Court for the District of Massachusetts, (App. 19-23), is unreported.

JURISDICTION

The judgment of the United States Court of Appeals, (App. 42), was entered on November 1, 1989. Jurisdiction is invoked under 28 U.S.C., Section 1254(1).

CONSTITUIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constituion of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

> public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Article II, Section 1, of the Treaty between the United States and the Republic of Italy, Oct. 13, 1983, T.I.A.S. No. 10837, provides in relevant part (second sentence):

> When the request for extradition relates to a person who has been sentenced, extradition shall be granted only if the duration of the penalty still to be served amounts to at least six months.

3. Article X, Section 2(e), of the Treaty between the United States and the Republic of Italy provides:

> 2. All requests for extradition shall be accompanied by:
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> ***
>
> (e) the texts of the laws describing the time limit on the prosecution

or the execution of the punishment for the offense.

4. The following is an attempt at a translation of an Italian statute or other legal pronouncement forwarded to Petitioner by Italian legal cousel, Annibale Schettino:

DETENTION ABROAD

"For the reason of the release from prison for expiration of the time to preventive custody, the incarceration suffered abroad commute in the duration of preventive custody, as it deduces from the precept of the Art. 138 C.P. (Deduction of the punishment from the preventive incarceration suffered abroad) Court of Appeal- United Section- Sentence issued on 28/1/950)

STATEMENT OF THE CASE

This petition seeks review of the First Circuit's decision affirming the denial by the United States District Court for the District of Massachusetts of a petition for writ of habeas corpus brought by the Petitioner, Antonio Manzi, to challenge an order for his extradition to the Country of Italy.

A complaint for extradition was filed in the United States District Court (Docket No. MBD-80-08-F) on February 11, 1985 seeking Manzi's extradition pursuant to the Extradition Treaty between the United States and Italy dated October 13, 1983 (hereinafter the "Treaty"). The Government's original submissions sought extradition of Manzi on a warrant to serve the remainder of a sentence imposed upon his conviction in Italy for rob-

bery, and on a warrant for untried charges of extortion, criminal association, the murders of Giussepe Fabi and Pietro Tangredi, and the attempted murder of Biagio Cava.

A provisional warrant for the Petitioner's arrest was issued by United States District Court Judge Frank H. Freedman, and a detainer filed, on February 11, 1985. The case was referred to U.S. Magistrate Michael A. Ponsor.

On or about June 25, 1987, the Petitioner filed a Motion for an Order Permitting the Taking of the Deposition of Eric Grose, an agent of the U.S. Immigration and Naturalization Service. In the "Motion to Depose" Manzi sought to depose Agent Grose on his participation in the apprehension of Biagio Cava who Manzi believed was in the United States to bring about Manzi's death. He said attempts had

previously been made on Manzi's life and the lives of his family by confederates of Cava. The Petitioner asserted that the Italian authorities were incapable of protecting him from attempts on his life and that extradition would pose a grave danger to his life.

The Motion to Depose also requested an evidentiary hearing with respect to the issue whether Manzi's extradition to Italy posed a danger to his life. United States Magistrate Michael A. Ponsor denied the Motion to Depose on July 14, 1987. The Magistrate conducted a hearing on or about September 8, 1987. On or about September 30, 1987, the Government filed a supplemental Memorandum enclosing, among other filings, a new Diplomatic Note from the Embassy of Italy revoking its request for extradition on the ground of ex-

tortion and reporting the Petitioner's conviction in absentia on August 2, 1986, (a 28 year sentence) with respect to the charge of criminal association, the two murder charges, and the attempted murder charge.

Thereafter, the Government was allowed further time to submit additional materials relative to the extradition proceedings. On December 23, 1987, the Government submitted a Second Supplemental Extradition Hearing Memorandum together with additional documentation from Italy. The new materials included the transcript of the proceedings underlying the Petitioner's convictions in absentia on the murder/criminal association charges. Another Diplomatic Note dated December 3, 1987, was submitted with these documents, seeking the Petitioner's extra-

dition with respect to an Italian conviction for receiving stolen property. After several extensions, the Petitioner, Manzi, filed his Memorandum in Opposition to Request for Extradition in mid-February, 1988. The Petitioner attached an Italian version of a statute received from an attorney in Italy, and a literal translation thereof, which the Petitioner-Manzi contended might operate to give him credit for time served on the Italian convictions for robbery and receiving stolen property during the pendency of the extradition proceedings.

Thereafter, on or about February 17, 1988, the Petitioner filed a Motion to Order Government to Clarify Status of the Foreign Conviction and Have

Translated the Decision on the Appeal thereof.[1] In that motion, with reference to the receiving stolen property and robbery convictions, Manzi also moved for an order that the Government provide translations of applicable Italian statutes concerning credit for time served by persons incarcerated pending disposition of requests for extradition. This "Motion to Clarify" was denied by the Magistrate. The Magistrate issued a Memorandum and Order Regarding Extradition Certification and Order of Commitment on May 18, 1988. (App. 24-36). In his memorandum the Magistrate, emphasizing the limited nature of his inquiry, gave reasons for his denial of the Petitioner's Motion to

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1. This pertained to the murder charges. All warrants for Manzi's extradition have since been recalled except those for the robbery and receiving stolen property charges.

Clarify. With respect to the Petitioner's request that the United States be ordered to produce the Italian statutes referencing credit for time served, the Magistrate found the Petitioner's contentions to be "utterly speculative." He also stated that the matter could be taken up before the Italian authorities. (App. 32).

The Magistrate's Extradition Certification and Order of Commitment were issued May 18, 1988, with his memorandum. (App. 37-41). On or about May 23, 1988, the Petitioner filed a Motion to Stay the Order pending appeal, which was allowed. On or about July 18, 1988, the Petition for Writ of Habeas Corpus and Certiorari which is the subject of this proceeding. Among other contentions, the Petitioner claimed the Magistrate's denial of his Motion to Clarify, the failure to order

production of the Italian statute affording credit for time served to persons detained abroad pending extradition, and his denial of Petitioner's motion to depose the agent of the United States Immigration and Naturalization Service and request for evidentiary hearing, all constituted a denial of his constitutional right to due process of law.

On August 31, 1988, Freedman, J. of the United States District Court denied the Petitioner's Petition. Noting the limited nature of habeas corpus proceedings, the judge essentially adopted all factual findings and legal determinations of the Magistrate. An appeal to the First Circuit Court of Appeals followed on October 5, 1988.

The First Circuit Court of Appeals affirmed the decision of the District

Court and Magistrate. (App. 1-18). The Court held that Manzi's request for the deposition and evidentiary hearing concerning his return to Italy "runs afoul of the well-established rule of 'non-inquiry' in these matters." (App. 9). The Court cited the federal courts' traditional refusal to consider questions relating to procedures or treatment that might await an individual on extradition -- even where there were questions raised as to the requesting country's ability to provide adequate safety and protection. It also noted the courts' choice to defer these questions to the executive branch because of its exclusive power to conduct foreign affairs. (App. 10-11). The First Circuit further agreed with the Magistrate that Manzi had failed to produce any factual evidence of a threat to

his safety. (App. 11).

On the issue of whether the Magistrate denied the Petitioner due process by failing to order translation or production of the statutes concerning time served in the United States, the First Circuit stated only that those matters "raise issues which should properly be placed before the Italian authorities." (App. 9).

REASONS FOR GRANTING THE PETITION

1. This case presents an opportunity for the United States Supreme Court to re-examine the legitimacy of the "Rule of Non-Inquiry" applied in extradition proceedings. The Petitioner, Antonio Manzi, was charged in Italy with, among other crimes, the attempted murder of one Biagio Cava. At the time the extradition proceedings were pending before the United States

Magistrate, Biagio Cava was apprehended by Eric Grose, an agent of the U.S. Immigration and Naturalization Service. The petitioner sought, by motion, to depose Grose concerning the apprehension of Cava, who he believed was in the United States to kill him. The petitioner asserted in the motion that attempts had previously been made on his life and those of his family by confederates of Cava. He questioned the ability of the Italian authorities to protect him, and asked for an evidentiary hearing.

The First Circuit Court of Appeals found Manzi produced "no factual evidence of a threat to his safety." In this it was plainly wrong. While simple averment of fear would not raise the issue, Manzi's assertion that there had been attempts on his

life, together with Cava's apprehension in the United States, lends substantial legitimacy to that fear.

The First Circuit was correct, however, that the deposition and requested evidentiary hearing run squarely against what has come to be known as the "Rule of Non-Inquiry." See Banoff & Pyle, "To Surrender Political Offender": The Political Offense Exception to Extradition in United States Law, 16 N.Y. U.J. Int'l J. & Pol. 169, 172 (1984); L. Anderson, Protecting the Rights of the Requested Person in Extradition Proceedings: An Argument for a Humanitarian Exception, in Transnational Aspects of Criminal Procedure. 153, 163-64 (1983). Traditionally, the federal courts have refused to consider questions relating to the political motives of a requesting state in seek-

ing extradition or inquire into the procedures or treatment that might await the individual upon his remittance to the requesting state. While not bound to do so, the courts have chosen to refer these considerations to the discretion of the Secretary of State. In Re Lincoln, 228 F. 70, 74 (E.D.N.Y. 1915). The protection of human rights has been left to the executive branch largely because of its constitutional role as the sole "organ" of the conduct of U.S. foreign policy. United States v. Belmont, 301 U.S. 324, 330 (1937). While there has been an occasional anomaly in the decided cases, In Re Moylas, 187 F. Supp. 716 (N.D. Ala. 1960) (full scale evidential hearing on political climate in town where respondent was convicted in absentia); Cf. Arnbjornsdottis-Mendler v. United States, 721 F.2d

679 (1983) (no evidentiary hearing allowed in light of Iceland's outstanding human rights record), there is no dearth of cases adhering to this rule of non-inquiry. Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986); Escobedo v. United States, 623 F.2d 1098, 1105 (5th Cir.), cert. denied, 449 U.S. 1036 (1902); Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980)(involving Italy); Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir. 1971), cert. denied, 405 U.S. 989 (1972); Matter of Extradition of Pazienza, 619 F. Supp. 611 (D.C.N.Y. 1985). (See also the cases cited by the First Circuit. (App. 9-10).

The time has come to re-examine the "Rule of Non-Inquiry." Despite protestations as to the "limited nature" of habeas corpus proceedings,

the circuit courts of appeals have begun development of procedural and substantive due process tests in extradition proceedings. Plaster v. United States, 720 F.2d 340 (4th Cir. 1983) (United States' attempt to extradite former U.S. solider to West Germany for 1968 murder held to violate due process where soldier had been promised immunity for his testimony (never needed) against others); Matter of Burt, 737 F.2d 1477 (7th Cir. 1984) (another U.S. soldier to West Germany; extradition denied due to delay; court said it would review not only procedural defects but also the substantive conduct of the United States in undertaking the extradition against the right to due process) See Comment: Extradition Reform: The Role of the Judiciary in Protecting the Rights

of a Requested Individual, 9 Boston College International and Comparative Law Review, Vol. IX, No. 2 (1986) (hereinafter Extradition Reform).

The Petitioner urges the United States Supreme Court to follow the development of the law in these cases and provide a framework for the evaluation of due process claims in the context of habeas corpus proceedings testing the sufficiency of the extradition process. The assurance that the executive branch will exercise its discretion to protect against humanitarian abuses provides very cold comfort. One commentator in this area indicates that from 1941 to 1962 only two extraditions are believed to have been denied by the executive branch. Note, Executive Discretion in Extradition, 62 Colum. L. Rev.

1313, 1325-28 (1962). Another recounts that in a 1980 interview, K. Eugene Malmborg, an Assistant Legal Advisor for the State Department stated that in his 14 years of experience he had no knowledge of an instance where the Executive had refused to return a fugitive who had not fallen within the "political offense" exception to extradition. Extradition Reform, supra, at p. 229, U.S. It is apparent that there is a very real tension between the demands of diplomacy and the interest in protecting those whose extradition is sought against human rights abuses. The author of Extradition Reform states:

> Indeed, the very flexibility and discreetness of executive review may be its major flaw. The lack of documentary evidence makes difficult the task of evaluating the Secretary of State's past performance in considering these types of claims. Requested individuals seeking to assert a

> defense based on humanitarian grounds have, under executive review, little information by which to assess the potential success of their claims. The secrecy that shrouds the process of executive review leaves open a very real possibility for unchallenged dismissal of a valid claim on grounds unrelated to humanitarian concerns. Id. at pp. 320-321 [Footnote References Omitted].

In short, the executive branch has not done the job, and there is no legitimate reason for the court to stay its hand -- particularly in light of the stakes involved for the requested person.

It may be objected that opening the door to evidence concerning the prison security measures in foreign countries would involve endless evidence on collateral issues. There is, of course, no need to allow that to happen if appropriate guidance as

to legal standards, scope of discovery, and allowable evidence is given to the lower courts and magistrates. The United States Supreme Court should take the opportunity to do so in this case, and provide the review in these matters which, unfortunately, the courts have assumed-- inaccurately-- would be forthcoming from the executive branch.

2. The First Circuit was clearly wrong in holding that the statutes concerning credit for time served were matters solely for the Italian courts. These materials were required by the Treaty, and if they do, in fact, give credit for time served, they provide the Petitioner with an absolute defense to extradition. The Government provided documentation suggesting that the Petitioner had 3 years, one month, and

1 day to serve on the robbery conviction and one year's imprisonment on the charge of receiving stolen property. (App. 38). The Petitioner's Motion to Clarify requested the Magistrate to order the Government to provide copies of any Italian statutes that might afford credit for time served abroad pending disposition of requests for extradition. The Petitioner submitted a reference to Article 138 of the Italian code of Criminal Procedure and a poor translation thereof with his Memorandum in Opposition. Even given the poor translation, it was clear that this statute in some fashion pertained to the issue of credit for time served abroad. (The Petitioner also provided the Magistrate with a copy of an Italian Supreme Court case which he had been advised bore upon the issue.)

The Petitioner's insistence that

the requested statute be provided was in fact entirely appropriate. This is a perfect example of evidence offered to explain, rather than contradict, the Government's submissions. Cf. Hooker v. Klein, 573 F.2d 1360, 1365 (9th Cir.), cert. denied, 439 U.S. 932 (1978); Matter of Demjanjak, 603 F. Supp. 1463, 1464-1465 (N.D. Ohio 1984). Moreover, the Treaty affirmatively enjoins the Government to supply statutes of this nature. Article X, Section 2(e) of the Treaty requires the submission of "the text of the laws describing the time limit on the prosecution or the execution of the punishment for the offense." Statutes giving credit for time served are clearly contemplated by that provision.

The importance of such a statute to the Petitioner is plain. If the time served awaiting the extradition pro-

ceedings is credited towards his Italian sentences, the robbery and receiving stolen property charges may not satisfy the "six months to be served" minimum to qualify as extraditable offenses. See Article II, Section 1 of the Treaty. The docket shows that a warrant for Manzi's arrest was issued on February 11, 1985. A detainer had also issued. Accordingly, the time spent incarcerated since 1985 might, as a result of the warrant and detainer, run concurrently against both his state narcotics convictions and the Italian convictions. The Petitioner was certainly entitled to appropriately translated statutes to examine the question, and the Magistrate's refusal to order the Government to do so constituted a denial of due process of law. The First Circuit's opinion that this was a matter solely for the Italian authorities was clearly error in light of the Treaty's

requirements. Certiorari should be granted to review this question.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Untied States Court of Appeals for the First Circuit.

Respectfully submitted,

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